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IN THE

Supreme Court of the United States

October Term, 1956.

No. 1331

HOLLAND AMERICAN LINE
(Sued as N. V. Nederlandsch-Amerikaansche
Stoomvaart Maatschappij),
Petitioner,

v.

PHILADELPHIA CEILING AND STEVEDORING
COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	4
Reasons Why the Writ Should Be Granted	7
Brief in Support of Petition	8
Conclusion	13
Appendix:	
Opinion of District Court	1a
Opinion of Court of Appeals	5a
Opinion of Court of Appeals on Rehearing	11a
Judgment of Court of Appeals on Rehearing	12a

TABLE OF CITATIONS.

Cases: Page

Atlantic & Gulf Stevedore v. Ellerman Lines, 369 U. S. 355 (1962) 11, 12

Byrd v. Blue Ridge Rural Electric Corporation, 356 U. S. 525 12

Crumady v. Fisser, 358 U. S. 423 11

Dziedzina v. Dolphin Tanker Corp., 361 F. 2d 120 ..... 9, 10

Hagans v. Farrell Lines, Inc., 237 F. 2d 477 (C. A. 3 1956) .. 8, 9

Hodgson v. Lloyd Brasileiro Patrimonio Nacional v. Murphy Cook & Co., 294 F. 2d 32 9

Italia Societa v. Oregon Stevedoring Co., 375 U. S. 315 10

Matson Terminals, Inc. v. Caldwell, 354 F. 2d 681 (1965) ... 11

Mortensen v. A/S Glittre v. Federal Paint Co., 348 F. 2d 383 10, 12

D/S Ove Skow v. Herbert, 365 F. 2d 341 (1966) 11

Thompson v. Trent Maritime, 353 F. 2d 632, 651 (C. A. 3 1965) 9

Union Stock Yards v. Chicago B. & Q. R. Co., 196 U. S. 217 9

Waterman v. Dugan & McNamara, Inc., 364 U. S. 421 11

Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 564 11

Articles:

Bue, Admiralty Law in the Fifth Circuit, 4 Univ. of Houston Law Review 350 11

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PHILADELPHIA CEILING AND STEVEDORING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Holland-American Line, respectfully prays that this Honorable Court may grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment of that Court entered October 13, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit, dated October 13, 1966, is not yet reported. The opinion of the District Court, dated May 12, 1965, is not yet reported. For the convenience of the Court, the opinion of the District Court is reproduced as part of an appendix to this Petition, 1a, and the opinion of the Court of Appeals and its order on rehearing are reproduced, 5a, 11a.

JURISDICTION.

(a) Jurisdiction to consider the within Petition is conferred upon this Court by 28 U. S. C. A. 1254(1).

(b) The judgment of the Court of Appeals for the Third Circuit affirming (2 to 1) the judgment of the District Court in favor of the Respondent and against the Petitioner was entered October 13, 1966.

(c) Pursuant to the Rules of the Court of Appeals, a timely petition (15 days) for rehearing before the Court *en banc* was filed. On November 28, 1966, the Court of Appeals granted the petition for rehearing. Reargument was scheduled before the Court *en banc*. At rehearing, eight judges sat. On December 28, 1966, the Court of Appeals affirmed the judgment of the District Court, the judges who heard the matter on rehearing being equally divided.

(d) A second petition for rehearing was filed within 15 days. It requested that the Court designate one or all of the three Senior Judges of the Circuit to sit so as to constitute a Court with an uneven number of judges so that the matter could be decided. The second petition for rehearing was denied February 16, 1967.

(e) Because it was unclear whether the time to file the within petition ran from December 28, 1966 or from February 16, 1967, Petitioner filed and Mr. Justice Brennan entered an order upon Petitioner's motion for enlargement of time. Under the order entered by Mr. Justice Brennan the time within which the Petition for Certiorari in this case might be filed was extended to April 27, 1967.

QUESTION PRESENTED.

In a shipowner's indemnity action against a stevedore, which arises out of a judgment obtained by a longshoreman against the shipowner; and where there is no conflicting evidence as to the factual condition which existed, is not the shipowner entitled to an instruction to the jury that if the jury finds that a dangerous condition improperly created by the stevedore during the performance of its work was causally related to plaintiff's injury, the jury must return a verdict in favor of the shipowner on its indemnity claim.

STATEMENT OF THE CASE.

Jones, a longshoreman, sued Holland-American Line (shipowner) for personal injuries sustained by him during the course of his work as a longshoreman discharging cargo from one of the Petitioner's vessels. Petitioner, the original defendant, joined Jones' employer as a third-party defendant, claiming indemnity.

The cargo being unloaded at Philadelphia was peat moss in bales. It was undisputed that at the commencement of the unloading operation, there was no accumulation of loose peat moss. As the Court of Appeals stated it, "as work progressed loose peat moss flaked off or was loosened by the longshoreman's hand hooks and accumulated in the hold of the vessel. Plaintiff claimed that he sustained his injury when he stepped into an open bilge box in the hold which was concealed by an accumulation of loose peat moss". (Slip Opinion, Page 2) (Appendix, p. 6a).

At the conclusion of the plaintiff's case, the shipowner conceded its liability to him. Submitted to the jury were the issues of the amount of the damages sustained by the plaintiff (found to be $45,000.00) and the issue of whether the shipowner was entitled to be indemnified by the stevedore.

The evidence as to the accumulation of peat moss in the hold was uncontradicted. Plaintiff, the only witness to the precise manner in which the accident occurred, testified that the accumulation of peat moss in varying depths completely obscured the floor of the compartment in which the cargo had been carried. He testified that it was not possible for him to see the floor upon which he was walking (11a), the loose peat moss floated on the water within the bilge well so that the opening which was usually covered by the steel plate was completely obscured by the accumulation of peat moss. According to the plaintiff, this

amounted to "a foot in some places, in some places there was more of the loss peat moss and we . . . and I didn't see the floor at all" (11a). Jones' version of what happaned [there was no other] was as follows:

> "So about 3:30 or quarter to 4—I don't know the specific time—we were almost done. I had about one bale left I had—I had to get in my end, and I walked to get this bale, and all of a sudden my leg disappeared into the peat moss, and as I—my leg disappeared, I twist my back and my right leg went out from under me and I hit my back up against a steel beam." (10a)

The fact that an accident had occurred came to the Chief Mate's attention when he saw the injured Jones on the ship's main deck with one leg wet. The Mate immediately surmised what had occurred. When he went into the cargo compartment, in spite of the fact that he knew precisely the location of the bilge well, he had to search for the perforated steel plate intended to cover it by running his fingers through the moss and he finally found it by groping for it in the peat moss. He could not see the floor of the tank (23b) and even though he knew precisely the location of the bilge well, he was unable to observe it (29⅜a).

The record is clear that there had been no accumulation of peat moss when the longshoremen began the unloading operation. An expert stevedore, called as a witness by the Petitioner, testified that it was improper stevedoring practice to have permitted an accumulation of peat moss or any other cargo which obscured the surface upon which the men had to walk. When the testimony of Jones, the plaintiff, and the Chief Mate (the only two witnesses to testify on this subject) was outlined to the stevedore foreman in charge of the work, he testified:

> "If it [the accumulation of peat moss] was that high, it would have to be removed." (40a)

At the close of the evidence, the Petitioner-Shipowner submitted written requests for charge, including one reading as follows:

> "Under all of the evidence, if you find a verdict in favor of the plaintiff against Holland-American Line, and you find that the accumulation of loose peat moss in the bottom of the tank was a cause or a contributing cause in bringing about the injury to Mr. Jones, then you must find a verdict in favor of Holland-American Line against Philadelphia Ceiling and Stevedoring Company." (57a)

The District Court denied that request for charge. Instead it submitted the case to the jury under a charge which several times reiterated "you (the jury) again are the super-expert" (52a). The District Court specifically stated to the jury that in spite of the evidence in the record, as outlined above:

> "You again are the experts. You have to determine how much peat moss is expected to be found in a tank such as this one, how much should be allowed to accumulate before you determine that it should be removed? You have to make that determination. (52a)
>
> * * *
>
> "But if you find that the Philadelphia Ceiling performed its work of discharging the cargo in a good and workmanlike manner, if you find that the proper performance of the work did not require prevention or avoidance of an accumulation of loose peat moss, or if you find that proper and workmanlike performance did not require the removal of an accumulation of peat moss . . . then you should find that . . . (the stevedore) . . . breached no duty to Holland-American . . . and in that event, you should return a verdict in favor of the third-party defendant, Philadelphia Ceiling, against the third-party plaintiff, Holland-American Line." (52a-53a)

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Court of Appeals for the Third Circuit, sitting *en banc,* which has much maritime litigation before it, has divided equally upon the question of what is the applicable law with respect to the duties owing as between stevedore and shipowner and the proper standard for instructing a jury in a case of that nature. The frequent recurrence of litigation of this type within the Third Circuit requires the guidance of this Court.

II.

The approach of the Court of Appeals for the Third Circuit in this and other cases is in conflict with decisions of this Court and of other Courts of Appeals.

BRIEF IN SUPPORT OF PETITION.

The approach of the Third Circuit to indemnity actions in maritime cases of this type has been consistently at odds with the approach of other Courts of Appeals.

In spite of the frequent holding by this Court that in indemnity actions such as the one now before the Court, the contract standard is applicable and a tort standard inappropriate, nevertheless, the Court of Appeals for the Third Circuit and the District Judges within that Circuit consistently view these cases as if a tort standard prevailed and juries in these actions are instructed to return their verdict based upon a tort rather than a contract standard.

That the Court of Appeals for the Third Circuit has not sailed a consistent course in shipowners' indemnity actions is demonstrated by its prior decisions. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (C. A. 3, 1956) was probably the first of a long line of decisions where breach of a contract for workmanlike service was equated with negligence. Contract interpretation is for Courts and Courts are to instruct juries as to the proper interpretation of the contract so that the jury may apply the facts it finds under the guidance of correct rules of law. If a contract requires a party to perform work in a certain fashion, the fact that one party introduces the testimony of an expert as to what constitutes proper performance is not, in the absence of a proper instruction to the jury, something which "must pass through the screen of the jury's judgment of credibility" (Slip Opinion, Page 3).

The evidence left no doubt that an accumulation of peat moss existed which obscured the walking surface and, of course, obscured the opening into the bilge well. Every person experienced and expert enough to express an opinion, both Petitioner's witness and Respondent's foreman, an acknowledged expert, agreed that if the condition described by the fact witnesses had existed, it was improper and should have been rectified before work continued.

Yet the District Judge charged and the Court of Appeals affirmed that the jury was "to determine how much peat moss is expected to be found in a tank, such as this one, how much should you allow to accumulate before you determine that it should be removed?" (R-52a). So an admitted breach, under the evidence, was tossed into the lap of the jury for consideration without a proper instruction as to the standard the jury was to apply.

In its 1956 decision in *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477, the Third Circuit clearly and admittedly applied a tort standard in denying a shipowners' indemnity claim. The rationale of its decision was based upon this Court's 1905 decision in *Union Stock Yards v. Chicago B&Q R. Co.*, 196 U. S. 217, a tort case. The Court of Appeals there said:

> "Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other." 237 F. 2d at 482.

There was not unanimity in the Third Circuit even in those days. Chief Judge Biggs and Judge Maris dissented on petition for rehearing. 237 F. 2d 483.

In 1961, in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional v. Murphy Cook & Co.*, 294 F. 2d 32, the Court again approved indemnity on a tort rather than a contract standard. Again dissenting on rehearing, Chief Judge Biggs pointed out:

> "In view of Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, and Waterman Steamship Corp. v. Dugan & McNamara, Inc., 360 U. S. 421, it would seem inevitable that we reappraise our decision in Hagans . . ."

It is impossible to reconcile two more recent Third Circuit decisions involving indemnity. Compare the opinions in this case and in *Thompson v. Trent Maritime*, 353 F. 2d 632, particularly at 651 (C. A. 3, 1965) with *Dziedzina v. Dolphin Tanker Corp.*, 361 F. 2d 120. In the *Dolphin Tanker* case the Third Circuit seemed to reverse its prior

trend and bring itself more in line with the decisions of this Court and other Courts of Appeals, but the change lasted only from May 24 to October 13, 1966.

So in the Third Circuit the result depends upon the composition of the panel which happens to be assigned to hear a particular case. The panel in the *Dolphin Tanker* decision (decided after argument but before decision in this case) clearly followed what we believed to be the teaching of this Court's decisions which culminated in *Italia Societa v. Oregon Stevedoring,* 376 U. S. 315 and the earlier decisions by this Court which are cited in support of the *Italia Societa* decision.

In the case at bar we are dealing with a case where the evidence clearly and without contradiction demonstrated a condition which constituted a breach of the stevedore's contractural obligation. Yet the District Court refused to charge the jury that if it found that condition was a substantial factor in bringing about the harm to the plaintiff, indemnity would lie. There were not, as the District Court's decision would have one believe, "various versions of how it [the work] ought to be done". The decision of the Court of Appeals is clearly at variance with the decision in and the rationale underlying the Second Circuit's decision in *Mortensen v. Glittre,* 348 F. 2d 383, and other decisions by the Court of Appeals for the Second Circuit cited in the following quote:

> "This warranty of workmanlike service comprehends the carrying out of the operations provided for in the contract in a reasonably safe manner. *Waterman S. S. Co. v. Dugan & McNamara,* 364 U. S. 421, 423, 81 S. Ct. 200, 5 L. Ed. 2d 169 (1960). It imposes a duty on the stevedore or contractor to clean up the area of operations, where necessary, to make it a safe place in which to work. *Nicroli v. Den Norske Afrika,* 332 F. 2d 651, 655-656 (2d Cir. 1964); *DeGioria v. United States Lines Co.,* 304 F. 2d 421, 423-424 (2d Cir. 1962). Since there was no evidence of conduct on Glittre's part which

relieved Federal of its obligations, the District Court properly held that Glittre was entitled to indemnification as a matter of law, for the breach of warranty in failing to take steps to rectify a known hazardous condition and eliminate a foreseeable risk of injury which brought into play the vessel's unseaworthiness, and which was a proximate cause of the accident which occasioned the shipowner's expense." 348 F. 2d 383.

If this Court meant what it said in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 335 U. S. 564, then clearly the decision of the Court of Appeals in this case is at odds with this Court.

The Third Circuit approach to indemnity has been specifically rejected by the Ninth Circuit in *Matson Terminals, Inc. v. Caldwell,* 354 F. 2d 681 (1965), and just as clearly but not so specifically by the Fifth Circuit. *D/S OVF SKOW v. Hebert,* 365 F. 2d 341 (1966). The views of the various Courts of Appeals are set out in "Admiralty Law in the Fifth Circuit", by Carl O. Bue, Jr., 4 Univ. of Houston Law Review, 350 at 416 (F. N.).

If the perforated cover over a bilge well is inadvertently and unexplainedly missing, that may impose liability upon the shipowner. Nevertheless, the stevedore who so conducts his operations as to cover up and conceal that condition is clearly "calling into play" the unseaworthy condition of the ship with resultant injury to both the injured longshoreman and the shipowner who must respond to the longshoreman in damages. That is clearly the rationale of this Court's decision in *Weyerhaeuser v. Nacirema, supra; Crumady v. Fisser,* 358 U. S. 423; and *Waterman v. Dugan & McNamara, Inc.,* 364 U. S. 421.

In *Atlantic & Gulf Stevedore v. Ellerman Lines,* 369 U. S. 355 (1962), this Court made it clear that a jury's verdict is controlling where an issue has been resolved by the jury if, but only if,

(a) There are disputed issues of fact to be resolved; and

(b) The charge of the Court to the jury states properly the applicable law.

The *Ellerman* decision and this Court's quotation of *Byrd v. Blue Ridge Rural Electric Corporation,* 356 U. S. 525 at 538, 539, teach that it is *where there are disputed fact questions* to be resolved that the Seventh Amendment fashions the Federal policy favoring jury decision. By the same token, where there is not a disputed question of fact, the Court should instruct the jury as to the law applicable to the facts which it does find.

The Second Circuit has, we submit, properly construed the decisions of this Court and an example of it is in its language in *Mortensen v. Glittre,* 348 F. 2d 383 where that Court said:

> "Since there was no evidence of conduct on Glittre's part which relieved Federal of its obligations, the District Court properly held that Glittre was entitled to indemnification as a matter of law, for the breach of warranty in failing to take steps to rectify a known hazardous condition and eliminate a foreseeable risk of injury which brought into play the vessel's unseaworthiness, and which was approximate cause of the accident which occasioned the shipowner's expense." 348 F. 2d 383.

There is no way in which one can reconcile the Second Circuit Court's decision in *Mortensen* and in the case at bar. The two are diametrically opposed, for had the law in *Mortensen* been applied by the Court of Appeals in this case (as half of the Court thought it should be) the result would have necessarily been the same as the result in *Mortensen.*

CONCLUSION.

One of the Courts of Appeals is evenly divided on a question which frequently recurs in that busy Circuit. We think we have demonstrated that earlier decisions of the Third Circuit, which undobutedly have influenced half of the judges against the position for which Petitioner argues, are entirely inconsistent with decisions in other Circuits and with decisions by this Court. A tort standard of conduct is not the proper instruction to give a jury in an indemnity action. It is for the Court to interpret the contract and instruct the jury as to the law which the jurors shall apply their fact findings. Since there was no evidence of proper performance by the stevedore here, the only question open was causal relationship. That should have been submitted to the jury as Petitioner requested and as half of the Court of Appeals believes should have been done.

Certiorari should be granted for all the reasons stated herein.

Respectfully submitted,

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